



Australian
Competition &
Consumer
Commission

Cartels

Deterrence and detection

a guide for government procurement officers





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Australian Competition and Consumer Commission
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Foreword



Public sector procurement is a multi-billion dollar industry, making a vital contribution to our economy and the welfare of all Australians. This process relies heavily on vigorous competition to provide taxpayers with the best value for money. But competition does more than just deliver purchasers with the best possible deal. It encourages businesses to innovate, strive for efficiency and meet the needs of consumers. As such, the activities of public sector procurement professionals have an impact well beyond the sum of moneys spent. They help shape the very nature of the industries that they deal with and the dynamics of the wider economy.

Cartels threaten the effective operations of markets. Their activities are an insidious form of theft that siphons many millions of dollars a year from taxpayers and consumers. They create an illusion of competition while actually inflating prices. By conspiring to control markets, cartels protect and reward their inefficient members while penalising honest, innovative and well run companies.

Cartels have long found public sector purchasing an attractive target, due to the large budgets and the unique nature of their business activities. The very factors that protect the integrity of public procurement also provide opportunities for those who seek to undermine competition.

The transparency and accountability of public spending gives cartels much of the information they need to organise their collusive arrangements. For this reason, the ACCC has developed this publication as a practical guide for government procurement professionals.

The publication is designed to give you the knowledge and the tools needed to help you detect possible collusion amongst suppliers. It gives examples of cartels that have been detected and the methods they used to deceive their customers. It gives specific guidance on when you may need to contact the ACCC to investigate suspicious behaviour.

Prevention, however, is better than cure. For this reason, the publication also gives practical advice on simple risk management strategies that, if adopted, will make your activities less prone to being targeted by a cartel. If potential cartelists are aware that you are vigilant, they will be far less likely to collude. For this reason, government procurement professionals are the first line of defence against the activities of cartels.

Graeme Samuel

Chairman

Australian Competition and Consumer Commission




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Introduction





This publication is written to assist procurement professionals understand cartel behaviour. It reviews the provisions of the *Competition and Consumer Act 2010* (the Act) that relate to your procurement practices by describing several types of prohibited, anti-competitive behaviour that can target your purchasing budget. It considers some steps you might take to maximise competition and save your organisation money, while also disrupting the possible operation of cartels by suppliers. It describes a range of methods for detecting suspicious conduct and how to report your suspicions to the Australian Competition and Consumer Commission (ACCC).

This publication provides practical tips and warning signs that indicate when tenderers may be colluding, as well as illustrative hypothetical examples of when to report to the ACCC.

Our aim is to help you and your agency avoid becoming the target of a cartel.

What is a cartel?

Our economic system relies on firms competing for business so that prices are truly determined by the market. Competition rewards those firms that innovate and strive to deliver the best value for money. Conversely, firms that are less efficient and fail to respond to the needs of customers will not prosper. Market economies need strong regulations to counter the temptation for inefficient suppliers to collude and undermine the competitive process.

A cartel exists when businesses agree to act together instead of competing against one another. This agreement is designed to drive up the profits of cartel members while maintaining the illusion of competition.

Cartels have been discovered working in a wide range of industries. Large well-known corporations and small local businesses have been involved. The products vary from petrol, concrete and air conditioning to cardboard boxes, freight and fire protection systems.

Cartels targeting the public sector

Government purchasing represents significant expenditure in the Australian economy. All levels of government have increased their outsourcing of goods and services. In this purchaser–provider environment, a greater emphasis is put on the integrity of competitive tendering to secure value for money and deliver policy objectives. But how do you know if tenderers are colluding to defeat competition and drive prices up?

Government bodies are large purchasers and make easy targets for cartels. While a private purchaser can be flexible in choosing their purchasing strategy, government is generally constrained by legislation and detailed administrative regulations.

Accountability requires transparency of processes and disclosure of information. Ironically, these same accountability and disclosure requirements can provide colluders with the necessary information they need to establish, maintain and enforce a cartel.

This publication aims to provide you with some useful tools for detecting collusion amongst your tenderers.

How cartels work

It is useful to consider what motivates some firms to collude rather than compete. Their aim is to extract higher prices and to shore up market shares by avoiding the effect of competition. Their loyalty is to other cartel members, not to you and your agency.

Cartels:

- usually know that their conduct is unlawful and will go to great lengths to keep it secret
- want stable membership—if members come and go, they do not have a long-term stake in keeping the arrangements intact
- need to control their members to make sure they bid the way they said they would—in other words, for a cartel to succeed the members must keep to their agreements and not cheat on each other; once in a cartel, the arrangements are usually enforced by threats of retaliation
- need strategies to deal with competitors outside the cartel: they can either dissuade them from entry, try to buy them out or invite them to join
- follow a long-term strategy to benefit their members at the expense of their customers.

There are several circumstances that can increase the temptation for businesses to collude rather than compete:

- A period of vigorous competition (such as price wars) or rapidly rising costs provides a strong motive for businesses to collude.
- An economic downturn may create an incentive for business to shore up their profit margins by colluding.
- Colluders might calculate that there is a low risk of detection.
- They might also calculate that the gains outweigh the potential penalties.

Cartels must continuously adapt to changing market conditions. For instance, if they successfully inflate profits within an industry, this tends to attract new suppliers, which in turn might be conscripted into the cartel.

Collusion and the law





Anti-competitive conduct is prohibited under Australian law. Individuals and corporations now face civil and criminal liability for their involvement in cartel conduct. There are four types of conduct that are defined as cartel behaviour. It is common for cartels to employ more than one strategy at any given time. These are:

- bid rigging
- price fixing
- market sharing
- output restrictions.

These will be discussed in detail now.

Bid rigging

Bid rigging occurs when suppliers communicate before lodging their bids and agree among themselves who will win the tender and at what price. Bid rigging is also referred to as collusive tendering.

Types of bid rigging

Collusive tendering is probably the cartel behaviour you are most likely to encounter, so it is useful to understand the various bid rigging tactics:

- Cover bidding—competing firms choose a winner while the others deliberately bid over an agreed amount, which ensures the selected bidder has the lowest tender and also helps establish the illusion that the lowest bid is indeed competitive.
- Bid suppression—a firm agrees not to tender thus ensuring that the pre-agreed firm will win the contract.
- Bid withdrawal—a firm will withdraw their winning bid so that a competitor will instead be successful.
- Bid rotation—competitors agree to take turns at winning business while monitoring their market shares to ensure they all have a predetermined slice of the pie.
- Non-conforming bids—firms deliberately include terms and conditions they know will not be acceptable to the purchaser.

Signs of possible bid rigging

- Suppliers appear to be taking turns at winning tenders or appear to be sharing the contracts by value.
- Regular suppliers decline to tender for no obvious reason.
- Bidders appear to deliberately include unacceptable terms within their tenders.
- Bidders sometimes bid low and sometimes high on what appears to be the same type of supply.
- You become aware that bidders meet before the close of tender, without you being present.
- The winning firm regularly subcontracts to competitors that submitted higher tenders.
- One firm of professional advisers represent several tenderers.

Queensland pre-mixed concrete cartel

The Pioneer, Boral and CSR cartel involved bid rigging, price fixing and market sharing in the pre-mixed concrete market in south-east Queensland from 1989 until 1994. The participants had more than 50 regular meetings and phone conversations. In addition to fixing prices, they agreed on market shares and not to compete on specified major projects. The participants even engaged an accountant to monitor market shares so they could enforce compliance with the agreement. The arrangement led to considerable overcharging on major construction jobs, including federal, state and local government projects.

Penalties of \$6.6 million were imposed on each company. Penalties were also imposed on six executives, the maximum being \$100 000. The case demonstrated a blatant disregard for the law, as each of the corporate groups had previously been found to have engaged in similar conduct.

Brisbane fire protection cartel

For about 10 years, until 1997, most of the companies in the fire alarm and fire sprinkler installation industry in Brisbane held regular meetings at which they agreed to allow certain tenders to be won by particular competitors. To ensure that the tenders were won by the agreed businesses, the companies agreed on the prices at which they would tender for particular projects.

It has been estimated that this conduct affected business worth more than \$500 million. The Federal Court imposed more than \$14 million in penalties on the companies and some of their executives.

Price fixing

Price fixing occurs when competitors agree on a pricing structure rather than compete against each other. It can be in the form of minimum prices or an agreed formula for pricing or discounting goods and services. Such agreements might be in writing but are often informal, verbal agreements.

Signs of possible price fixing

- Tenders or quotes are much higher than expected. This may indicate collusive pricing, or it may just be overpricing (not illegal in itself). It may simply reveal that your estimates are inaccurate. It is in your commercial interest to make inquiries and determine whether your price expectations are reasonable.
- All suppliers raise prices simultaneously and beyond what seems to be justified by changes in input costs. You can ask suppliers why this is so. You might also consider surveying suppliers of inputs so you are better equipped to recognise suspicious pricing movements.
- Prices submitted are much higher than previous tenders or published price lists.
- A new supplier's price is lower than the usual tenderers. This may indicate there has been collusion among the incumbent tenderers.
- Prices drop markedly after a new supplier tenders. This may indicate that the existing suppliers have been colluding and the new supplier has forced them to compete.

Visy and Amcor packaging cartel

Between them, Visy and Amcor controlled around 90 per cent of the corrugated fibre packaging market (the humble and generic cardboard carton), which was worth about \$1.8 to \$2 billion per year. From 2000 to 2004, the two companies conspired to raise the prices of their products while maintaining their respective market shares.

Both companies nominated executives to consult and coordinate price rises and collude when negotiating quotes for customers, so they retained a near static slice of the pie. The executives met regularly and secretly in public places, such as hotels and parks, and also communicated using public phones and special prepaid mobiles. When larger customers wished to renegotiate their contracts, the companies swapped information to ensure that the competitor's quote was higher than the existing price structure (cover pricing). If a client changed supplier, then an account of around the same value was exchanged.

The management of Amcor notified the ACCC and was granted immunity from prosecution. Visy eventually admitted the illegal behaviour and was fined \$36 million, while fines to individuals totalled \$2 million. Thousands of firms (and ultimately millions of consumers) were significantly overcharged by the cartel. The Federal Court ordered Visy and Amcor to pay \$95 million in damages to a customer class action involving more than 4500 businesses.

Animal vitamins cartel

Three Australian suppliers of animal vitamins held meetings and telephone conversations during which they agreed on the prices that they would charge for certain vitamins. They were the Australian subsidiaries of large foreign companies that had also entered into price fixing and market allocation agreements overseas. The Federal Court imposed penalties of \$26 million against the Australian suppliers.

Market sharing

Market sharing occurs when competitors agree to divide a market so the participants are sheltered from competition. This sharing might be a preference for customers in certain geographic areas or a division of contracts within an area.

It might also be an agreement not to compete for established customers or not to produce each other's products or services.

Signs of possible market sharing

- Firms charge different prices in different locations, and the difference can't be explained by transport costs.
- A supplier declines to tender in certain locations, stating that to supply would be an intrusion on someone else's 'patch'.
- A supplier states that they can't supply certain products or services because of agreements with other businesses.
- A firm's representative states that another firm should not have supplied you because of industry agreements.
- Bidders wait until the last minute to submit their bids and express interest in whether a non-local or occasional bidder is tendering.

Freight cartel

This case involved TNT Australia, Ansett Industries and Mayne Nickless. In five main meetings between 1987 and 1990 attended by representatives of the three companies, a series of agreements were reached.

The companies agreed not to poach each other's customers and, if one of the companies was requested to quote by a customer of another, it would either fail to do so or would submit a quotation above the price charged by the other company.

If a customer moved from one company to the other, compensation would be made by returning customers of the same value by the process of up-rating them or driving them away by providing poor service. There was a balancing of accounts of customers lost and gained and payment of compensation. No quotes would be given to customers of another firm over the telephone. They also agreed that uniform prices would be charged for what were referred to as 'air satchels'.

These agreements were put in place by each of the companies on many occasions. The practices were believed to be in place for 20 years through executive officers. Fines of \$11 million were imposed.

Power transformers cartel

Many of the major suppliers and manufacturers of both power and distribution transformers were involved in price fixing and market allocation. A whistleblower alerted the ACCC to the cartel conduct. The customers affected by the cartel included some of the largest electricity transmission and distribution utilities across Australia, resulting in many Australian consumers paying higher electricity bills.

The Federal Court imposed total penalties of more than \$35 million on the participating companies and some of their executives.

Output restrictions

Output restrictions occur when the participants in an industry agree to reduce or restrict supply with the aim of creating scarcity. The purpose of the arrangement is to prop up or increase prices.

Generally speaking, the action needs to be industry wide to achieve the cartel's desired result. It is probably the type of cartel behaviour government purchasers are least likely to encounter.

Tasmanian Atlantic salmon growers

In 2002 the Tasmanian Atlantic salmon industry was in financial difficulty and decided that supply was outstripping demand. The Tasmanian Salmon Growers Association decided that if all members culled stocks by about 10 per cent demand would be met and further price falls would be avoided. It sought legal advice, but did not correctly brief its lawyers. Consequently, the advice that the cull would not breach competition laws was flawed. After a meeting of growers approved the plan, agreements were circulated. One member, Tassal, subsequently culled its stocks. The ACCC investigated and the cull was stopped.

Because of the parlous state of the industry and the fact that legal advice had been sought and cooperation shown, the ACCC chose not to pursue penalties. Instead, it obtained court orders requiring the industry to establish trade practice compliance training and to not proceed with any future culls.



How to detect collusion

Role of purchasing officers

If you work in a field of government procurement, you are almost certainly going to know more about that market than outside agencies and be in a position to notice the first warning signs of collusion. The ACCC's role is to investigate and prosecute cartel behaviour, but you are the front line of defence and detection.

Experienced procurement professionals are uniquely placed to detect collusion. By comparing bids with what your experience tells you should be the norm, an astute purchaser can develop a hunch about suspicious bidding patterns.

While talking with company representatives, you may also pick up valuable information or tips that indicate something may be amiss. In these circumstances, we encourage you to report your concerns.

Market risks

While collusive behaviour may occur in any industry, there are some specific market conditions that make the formation and continuation of cartels an easier and more tempting option for suppliers. Understanding the market allows you to assess the risks and your level of exposure. (See table on page 17).

Warning signs

There is rarely a simple indicator of cartel activity, but there are some warning signs that suggest a closer look is in order. There may be reasonable explanations for some of the following signs but, if there is not, you may need to inquire further.

Cartels often go to great lengths to remain secret and are usually very hard to detect. Many warning signs can be ambiguous. For example:

- similar pricing may indicate collusion or it may simply reflect similar input costs and even highly competitive tendering
- an active trade association might make collusion easier, or it may promote high standards within an industry
- simultaneous price rises might be suspicious or may be explained by industry-wide cost increases.

If you are concerned about overpricing, make inquiries to ensure that your expectations are reasonable. High prices are not illegal.

A supplier can set their prices wherever they like and compete on whatever terms they choose, such as quality or level of service. It is when competitors agree not to compete that the conduct is unlawful.

We recognise that effective cartel detection may require several suspect or unusual incidents or a developing pattern of behaviour before your suspicions are aroused. But a simple error in competing tenders, such as identical misspelling or miscalculations, may expose collusion by apparent competitors.

And statements by businesses that refer to ‘industry agreements’ and the like may indicate market-sharing arrangements. It is you, the procurement professional, who is most likely to notice telltale signs. If and when you suspect cartel behaviour, you should inform your management and your organisation’s legal adviser.

A tear-out checklist of the warning signs is provided in the Purchaser’s checklist included with this publication.

Market risk factors

This table outlines particular market conditions that can stimulate the formation of cartels.

Conditions that may make it easier for cartels to operate	Why?
Suppliers	
<p>A small group of suppliers might control most of a market for many reasons:</p> <ul style="list-style-type: none"> • long-established firms have come to dominate the market • the industry is specialised or capital-intensive; therefore, it is costly and difficult for new firms to set up (e.g. airlines) • many competitors are unable or unwilling to supply because of geographic isolation (e.g. regional Australia). 	<p>The more suppliers available, the more choices a purchaser has. If there are many potential suppliers, it is more difficult and risky for them to communicate with each other and attempt to establish a cartel.</p> <p>If new suppliers regularly enter an industry, they are not likely to be cartel members. They will need either to be enlisted, bought out or scared off for a cartel to maintain its control.</p>
Products	
<p>A product or service may lend itself to control by suppliers if:</p> <ul style="list-style-type: none"> • it is essential and has few or no alternatives (e.g. fire protection) • demand is stable and predictable (e.g. construction, steel or bricks) • it is a standard 'off the shelf' product or service and the same for all providers and buyers (e.g. premixed concrete) • the product or service is highly technical or specialised (e.g. medical supplies). 	<p>The more product choices a purchaser has, the harder it is for suppliers to conspire to control a market.</p> <p>If a product is relatively generic, and demand is stable and predictable, it is easier for suppliers to attempt to share markets and fix prices. A volatile market is far harder for a cartel to control.</p> <p>Clearly, if buyers lack expertise in an area of purchasing, it is easier for suppliers to fix higher prices.</p>
Purchasers	
<p>The way that purchasers operate may create opportunities for cartels:</p> <ul style="list-style-type: none"> • Purchasing activities are regular and predictable (e.g. local government road works). • Purchasing activities are open and transparent (e.g. government tendering) 	<p>A cartel needs to be able to monitor purchasers and understand their requirements to effectively allocate contracts and fix prices.</p> <p>A cartel also needs to be able to monitor its own members to ensure that they keep to their agreements.</p>

Unusual mistakes

Despite the fact that cartels are usually secret arrangements, there is a long history of cartels coming undone because of plain old carelessness. Everyone makes mistakes, but if a mistake indicates collusion it may be crucial evidence of illegal behaviour. It pays to be on the lookout for the following telltale signs:

- There are identical spelling or calculation errors in competitors' bids.
- There is an uncanny similarity in the layout or language in competing tenders.
- A tender document is in electronic form and has been prepared on a competitor's computer. (This can sometimes be revealed by checking the document's metadata, usually under 'properties' in the file menu).
- A firm's representative says something that indicates they are aware of the details of a competitor's tender.
- All bids are delivered by one agent—or even delivered in the same envelope.

Whistleblowers

Illegal cartel activity is often exposed by insiders who have knowledge of, or been involved in, the arrangement. Should they be willing to provide information, you should encourage them to reveal what they know and provide that information directly to ACCC investigators.

- Let informants know that information can be provided confidentially to you, or the ACCC.
- The ACCC immunity policy for cartel conduct can be used by cartel members who break rank and report their involvement.
- If a supplier's employee or agent suggests that they are aware of collusion, **do not ignore it**. Note the details and report the incident to the ACCC.

Identical pricing

Identical bids can be evidence of a highly competitive market (price convergence) or, alternatively, a lack of competition. By themselves identical bids do not necessarily indicate collusion.

The significance of identical pricing cannot be fully appreciated without a broad understanding of the product's price history. For example, are any fluctuations consistent with the supplier's previous pricing? Identical bids become questionable if they mark a change from earlier competitive bidding.

Quotes for supply may be identical by pure chance, but this is more likely if:

- the goods have a well-established market price or a brand name with a 'suggested retail price'
- the quantity is a small proportion of the supplier's total sales
- the goods are supplied from stock rather than ordered
- freight expenses are a low proportion of the total cost.

The probability of a chance, identical bid is very low when the tender is for complex, non-standard products or if the quantity is a large proportion of the supplier's total sales. Larger sales are more likely to encourage a supplier to examine their margins and provide a more competitive quote.

There is obviously more chance of identical bids if the quotes are in round figures. For example, if two building contractors both quote \$1.25 million for a project, it may not in itself be suspicious; it may arouse suspicion, though, if both quotes are for \$1 253 312.

Overseas experience has shown it is very risky to split contracts between tied bidders, as it can make market sharing all too tempting and easy. When all else is equal, it is better to randomly select a winner than reward both bidders.

Tender analysis

It is often useful to study the bidding history of a product. This may provide evidence that supports a suspicion of collusion. For example, the receipt of identical bids is generally suspicious. A pattern of close bids may also suggest collusion, but can just as easily be the result of price convergence in a highly competitive market. Tender rotation is usually only detectable by studying the bidding patterns of successive winning and losing tenders over time.

Ask yourself:

- Do your records suggest that bidders seem to be taking turns at winning tenders? This may indicate tender rotation.
- Do tenderers seem to win around the same percentage of the contracts from year to year? This may indicate market sharing.
- Do suppliers seem to win contracts in certain areas but not in others? This may also indicate market sharing.

We also suggest that you occasionally check with other agencies that purchase the same goods or services and compare notes. For example, if a seller of office supplies only bids on contracts let by state departments—but declines to bid on contracts for schools—this may indicate market sharing.

It may only be at an aggregated level across an entire industry sector that the extent of cartel behaviour is evident. Your suspicions may lead the ACCC to an industry-wide inquiry that unravels large-scale collusion.



How to deter collusion

Anti-collusion tender clauses

Clauses in your tender documents that indicate you are alert to collusion will go a long way to deterring such behaviour:

- (1) Warn bidders in your tender documents that you will report all suspected instances of collusion to the ACCC. This is a strong deterrent to collusion that enables agencies to share otherwise confidential tender information with the ACCC.
- (2) Require disclosure of all subcontracting arrangements that involve dealings with competitors, including those made after awarding the contract. Also ensure that you are notified if a winning bidder assigns their contract to a competitor. If unsuccessful bidders receive work from the successful bidder, the subcontracts may be a reward for submitting a non-competitive bid.

As a purchaser, knowing whether your bidders are sharing work amongst themselves may provide critical information indicating market sharing or tender rotation schemes.

- (3) Require bidders to sign a warranty confirming that their bid has been developed independently from their competitors and that no consultation, communication, contract, arrangement or understanding with any competitor has occurred regarding:
 - prices
 - methods, factors or formulas used to calculate prices
 - the intention or decision to submit, or not submit, a bid
 - the submission of a bid which is nonconforming
 - the quality, quantity, specifications or delivery particulars of the products or services to which this call for bids relates
 - the terms of the bid.

It is recognised, however, that certain types of agreements between competitors are not unlawful so tenderers should be required to disclose such exceptions as part of the warranty.

Arrangements that are not unlawful can include:

- certain joint ventures
- conduct authorised by the ACCC
- communication with a competitor for the purpose of subcontracting a portion of the tender, and where the communication with that competitor is limited to the information required to facilitate that particular subcontract.

Only bidders that have something to hide would be reluctant to sign. Such a warranty requirement should be part of your tender terms and conditions and would feature as a contractual clause.

The warranty requirement signals that you are alert to collusion and consider it unacceptable. It may also facilitate your agency seeking damages for a contractual breach if collusion is subsequently discovered.

If you are unclear about the information disclosed, you can contact the ACCC.

- (4) It is also worth considering requiring tenderers to disclose to you any proceedings involving anti-competitive conduct, in Australia or overseas. This should include the company making the bid and any other party associated with that bid, including related companies, directors and senior management.

Tenderers should be required to tell you:

- (a) the names of the parties to the proceedings
- (b) the case number
- (c) the general nature of the proceedings
- (d) the outcome or current status of the proceedings.

Information about past collusive conduct will allow you to properly assess the marketplace behaviour of bidders, and will allow you to implement appropriate risk management strategies. For ACCC recommended tender clauses see the Purchaser's checklist included with this publication.

Confidentiality

Keep your decision-making processes and policies confidential. Cartels need to be able to monitor bids to ensure that members are sticking to their agreements. Where possible, guard the identity of bidders and the value of bids, at least until after a contract has been awarded. In particular, don't alert existing operators of new potential suppliers.

Competitive tender design

Try to get as many bidders as possible and compare their bids rigorously. Approaching a wide range of suppliers may not always prevent collusion, but it can disrupt the operation of a cartel when you broaden the field.

Predictability and transparency can aid the operation of a cartel, especially where they attempt to manipulate tenders. By periodically changing the way you engage with the market, you can improve competition and your outcomes.

Consider the following:

- Do your processes tend to exclude possible suppliers, such as smaller operators? You may in some instances reduce the size of certain supply contracts to attract alternative suppliers. Or,

you can actively encourage joint ventures by smaller suppliers, so they may better compete with the market heavy weights for your tenders.

- You may wish to extend the term of a supply contract so the arrangement will not lend itself to tender rotation.
- Another useful procedure is cooperative purchasing, where several agencies combine to obtain the benefits of volume purchasing. This practice increases the incentive for suppliers to compete and can also disrupt bid rotation.
- Do you require suppliers to always tender to maintain registration? This may lead to smaller suppliers submitting 'cover prices' if the contract is beyond their capacity, simply to remain registered for future jobs.
- Do your systems tend to favour incumbents?
- A prolonged cycle of 'select tenders' may lead to bidder complacency. It is always a good idea to periodically test the broader market through an open tender.
- It is not unusual for state and local government bodies to prefer to deal with local operators, to stimulate local employment and economic activity. As with select tenders, test the broader market occasionally.

Effective tender design can improve your outcomes as well as being a good tool to deter and disrupt cartels.

Monitor your outcomes

Keep track of past tenders and pricing movements so they can be analysed over time. This will help you to understand your market and assist you with estimating and budgeting, as well as making it harder for cartels to target you. It may also help you detect irregularities such as tender rotation. In summary, there is no substitute to being alert to possible collusion when conducting a tender.

Deterrence tips

Assists cartels	Deters cartels	Why?
Predictability of tender timing	Deliberate strategic choice to occasionally alter your tender schedule	Regularity makes it easier for cartels to share contracts by rotating tenders or other bid rigging tactics.
Regular size of supply contracts	Varied size and scope of purchases	Regularity makes market allocation easier. Smaller supplies may attract smaller operators that are not members of an existing cartel. A larger supply (say for a longer period) might achieve a better price and also deter tactics such as tender rotation.
Small group of regular suppliers	Larger group of suppliers that often changes	It is harder to maintain collusion when new operators continually need to be enlisted to ensure the coverage of a cartel.
Splitting contracts between identical tenders	Choosing another method of solving tied bids, including random choice	Splitting makes market allocation extremely easy and partially removes the incentive to compete.
Disclosing identity of all bidders before the close of tender	Limited disclosure of identity of bidders	Full disclosure makes it easier for cartel members to contact all bidders and attempt to collude.
Disclosing all bidders' prices	Limited or no disclosure of prices bid in unsuccessful bids	Full disclosure allows a cartel to monitor all bids to ensure members stick to their arrangements and don't cheat.
Purchasers are not experts on the value of what they purchase and the dynamics of their market	Purchasers understand their market and the approximate value of what they purchase	It is much harder to fix prices if buyers are alert to industry trends or overpricing.

Assists cartels	Deters cartels	Why?
Purchasers rely solely on suppliers and the competitive process to calculate value of supply	Purchasers obtain independent estimates of value before seeking quotes or tenders	The estimate will give purchasers a warning if quotes or tenders are excessive.
Staff are not trained to reduce risks and detect cartels	Staff are trained in reducing risk and detecting warning signs	Without training, staff may not notice warning signs or not know what to do about them.
Purchasers do not keep detailed records or analyse tenders over time	Purchasers analyse tenders for trends and irregularities	Tender analysis may reveal trends over time that might not be apparent in the short term.
Closed shortlists require suppliers to submit tenders regularly to remain on a shortlist of preferred tenderers	Regular open tendering	Shortlists should only be used for as long as they are needed.



The role of the ACCC

The ACCC is responsible for enforcing the relevant parts of the Competition and Consumer Act, including provisions against anti-competitive conduct. It is Australia's sole agency for litigating breaches of competition law.

Contacting the ACCC

The ACCC does not expect you to undertake a complex investigation or to provide irrefutable proof that bidders are colluding. However, it is helpful if you assemble the facts that demonstrate your concerns.

Investigators generally seek three kinds of information concerning suspicious behaviour:

- **Details of any incidents that have aroused your suspicion**—if possible, this should be backed up by relevant documents, such as copies of the bids.
- **Any other evidence, such as notes of phone calls and conversations with bidders**—it is best that you write down any such anecdotal information at the earliest convenient time.
- **Whatever background information is available, such as past tenders, the history of relevant products and dealings with the industry sector**—this might include retained records or more general perspectives on past practices.

The ACCC wishes to assure you that we are not seeking to stop, interrupt or overturn any tendering exercise you are involved in. Cartel investigations can take many months before they are concluded, so we have no intention of upsetting your business processes in the meantime.

Confidentiality

You can report to the ACCC on a completely confidential basis, and investigators will keep your identity a secret. Even if an investigation leads to litigation before a court, it does not automatically mean you will be asked to provide evidence.

Penalties

The Act provides serious penalties for cartel conduct. For a breach by a corporation, the Federal Court of Australia can impose a maximum penalty of:

- \$10 million, or
- when the value of illegal benefit can be ascertained, three times the value of the illegal benefit, or
- when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover of the corporation in the preceding 12 months.

A civil penalty of up to \$500 000 can be imposed on an individual.

The court may disqualify directors and officers from managing a company. It can also prohibit any indemnity for legal costs and financial liabilities such as fines.

Cartel conduct is considered so harmful that criminal penalties may be imposed on individuals including imprisonment of up to 10 years and/or fines of up to \$220 000 per contravention.

Immunity for cartel members

The ACCC has established an immunity policy for both corporations and individuals involved in a cartel that then go on to supply important information that exposes the collusion. Should you be contacted by a whistleblower it is important that you refer them to the ACCC's immunity policy which states that, in certain circumstances, immunity from prosecution may be offered to those who assist the ACCC. The immunity is strictly conditional and subject to the following:

- Only the first person or corporation to bring the matter to the attention of the ACCC may qualify for immunity (those who subsequently cooperate may be offered leniency).
- Immunity will not be offered if an informant tells the ACCC something that it already knows.
- They must not have been the clear leader of the cartel or have coerced others to join.
- They must cooperate fully—and continue to cooperate—with the ACCC, or the immunity may be withdrawn.
- A person or corporation may request a 'marker' for a limited period. This will, in effect, preserve first place in the queue while the applicant collects information or seeks legal advice.

The policy has been extremely successful, both in the detection of cartels and in providing a powerful deterrent to those considering such arrangements. Clearly, the policy can inject distrust and suspicion among the members of a cartel and destabilise their relationships.

Powers to investigate

The ACCC is best placed to investigate collusive conduct. It has a legislated capacity to compel any person or company to provide information about a suspected breach of the Act, including documents or verbal evidence, as long as there is reason to believe they are capable of doing so. The ACCC also has the authority to begin court actions, seek enforceable undertakings and apply for penalties where appropriate.

You can keep yourself informed about cartel developments around the country. The ACCC provides a free email subscription service about cartels for those involved in government purchasing. It provides timely advice of national and international cartel cases, as well as tips on detection.

You can register by emailing your details to:

cartelinfoservice@accc.gov.au

Reporting and inquiries

If you would like to know more, or wish to report suspicious behaviour, contact us.

ACCC Infocentre

1300 302 502

The ACCC has a large collection of resources on its website:

www.accc.gov.au

You can email the ACCC confidentially to the dedicated cartels address:

cartels@acc.gov.au

Questions and answers





What do cartels cost the Australian economy?

It is very difficult to calculate the total cost of cartels to the Australian economy, but the cases exposed suggest that the damage could annually be hundreds of millions of dollars. When a cartel is operating, the effect is usually to inflate the price of goods and services by at least 10 per cent—probably a conservative estimate. In the private sector, this cost is ultimately paid by consumers. In the public sector, ratepayers and taxpayers bear the cost, which in turn may reduce the services government agencies can deliver. Some overseas cartels have even been shown to contribute to inflation.

What is the extent or prevalence of cartels?

From the cases the ACCC litigates or settles, we know that cartels are extremely damaging to the competitive process and therefore the wider economy. Overseas or international cartels demonstrate the same detriment, sometimes on an even larger scale.

An Australian National University study suggests the south-east Queensland concrete cartel inflated profits (by overcharging customers) by as much as \$88 million over five years (from 1989 to 1994), while the transformer cartel netted an extra \$70 million to \$80 million over six years (from 1994 to 1999). The same study estimates the Queensland fire cartel extracted an extra \$75 million over 10 years (from 1987 to 1997)—the list goes on.

An estimate of the number of cartels that avoid detection is obviously speculative, as is any estimate of undetected illegal behaviour. However, some overseas economic studies have concluded that only around 10 per cent to 17 per cent of cartel conduct is ever discovered. The only thing we can be sure of is that not all cartel behaviour is detected.

Will I breach confidentiality of the tender if I notify the ACCC?

Commercial confidentiality is not designed to protect illegal behaviour, but in any case if you have included the suggested clauses (see Purchaser's checklist included with this publication) in your tender documents the possibility of reporting has been accepted by the bidder. If you are concerned about breaching confidence, you may wish to seek advice on your obligations.

Is it appropriate to talk to tenderers if you have a suspicion they are colluding?

Probity requirements often prevent you from contacting tenderers lest it appear you are favouring one over another. However, asking questions of a tenderer to test whether they might have colluded and therefore broken the law would not appear to confer an unfair advantage or raise probity issues. The manner in which you undertake those inquiries would nevertheless require careful management and appropriate documentation.

The ACCC recommends that you do not reveal to tenderers any suspicions you may have lest you inadvertently tip them off. The ACCC does, however, encourage procurement officers to collect, document and assemble as much information as possible to support and substantiate any concerns.

Asking a supplier direct questions about their tender may be the only way in which further information can be gathered. If you are unsure whether you should contact a tenderer please contact the ACCC for advice and guidance.

If an investigation discovers that I have previously (but unknowingly) awarded a contract to a cartel, will I have broken the law?

Inadvertently awarding business to a company involved in a cartel is not illegal, and should not reflect badly on your integrity. The reality is that cartel members usually know that their agreements are unlawful and go to great lengths to conceal them from purchasers.

The ACCC's only concern is whether your suppliers have been colluding, not the internal processes of the purchaser. Investigators may seek details of the procurement, such as copies of bids and other relevant documents but your procurement practices and the continuance of existing contracts is a matter upon which you should take your own advice.

Are 'buy local' and similar purchasing policies anti-competitive?

It is not unusual for state and local government bodies to prefer to deal with local operators to stimulate local employment and economic activity. This is not a breach of the Act; however, if you are not testing the broader market from time to time, local suppliers may feel too comfortable and not compete as vigorously as you would wish. It pays to be aware of this and manage the risk.

Is 'select tendering' a breach of competition law?

How you select and qualify your suppliers is up to you. However, be aware that such policies might make the formation of a cartel easier and therefore more tempting if the field is small and the competitors know each other. As with 'buy local' policies, it is good practice to occasionally test the broader market.

Are there any exceptions to anti-competitive behaviour?

There are some instances when apparently anti-competitive arrangements do not breach the Act.

They include:

- Buying groups—some businesses combine their purchasing to achieve greater economies of scale.
- Joint ventures—where businesses combine their operations for a particular project.
- ACCC authorised—sometimes there is a unique circumstance where the detriment of an anti-competitive arrangement is outweighed by a countervailing public benefit and should be allowed.
- Overseas selling—if goods are to be exported, then some provisions of the Act do not apply.

It must be stressed that there are strict guidelines for exceptions and authorisations.

The ACCC can advise you if suppliers make such claims.

Hypothetical 1

Four building firms have tendered for several projects with no apparent problems. The tenders have been close and all four have been successful at different times. All four firms have submitted tenders between \$2.3 million and \$2.4 million, a little over the estimated price. However, a new firm has recently appeared and has lodged its first tender. The new firm is awarded the contract.

Possible price fixing

EVENT	The new tenderer bids \$1.85 million, around 20 per cent below the others.
ALERT	Suggests the other bidders were overpricing.
ACTION	Note and monitor subsequent bids.
EVENT	At the close of the next tender, the new firm is now the highest bidder. One of the original firms wins the tender at a price above estimate.
ALERT	Suggests, but does not prove, that the new entrant has been communicating with the established firms.
ACTION	Note and continue to monitor.
EVENT	It is noted that the new firm is now working as a subcontractor on the project.
ALERT	Suggests the new firm may have entered into an agreement with the existing firms.
ACTION	Alert your management and report it to the ACCC.

Possible market sharing

EVENT	The new tenderer bids \$1.85 million, around 20 per cent below the others.
ALERT	Suggests the other bidders were overpricing.
ACTION	Make a note and monitor subsequent bids.
EVENT	At the close of the next tender, all bids are below expectations. It appears that the four original bidders have reduced their prices.
ALERT	Suggests that there has been a competitive response to the new entrant.
ACTION	Make a note, continue to monitor.
EVENT	During the next tender, the new firm declines to bid. When asked why, the manager quotes 'industry agreements'.
ALERT	Suggests a cartel is present.
ACTION	Report to the ACCC.

Hypothetical 2

For a number of years, the three largest local suppliers of concrete have been tendering to supply for civil engineering projects. The bids have generally been at the high end of estimates, but there are few firms with the capacity to contract for such large jobs. The bids have always been close and appear to be competitive.

Possible price fixing

EVENT	While reviewing past projects for budget purposes, it is noted that all three firms have been awarded contracts of about the same dollar value for five years, and that the firms appear to be 'taking turns'. In the latest tender, it is noted that all three firms have quoted between 20 per cent and 25 per cent over the estimated price. There is no indication that the price of concrete has risen above inflation.
ALERT	Suggests bidder rotation.
ACTION	Make a file note and consider contacting the ACCC.
EVENT	Later, when asked, all three managers reply that the industry's rate of return on capital has been too low and needs to rise.
ALERT	Suggests possible collusion and price fixing.
ACTION	Report to the ACCC.

Possible whistleblower

EVENT	A staff member meets a former employee of one of the firms at a social function. He mentions that he thinks the firm should have paid him more, considering all the cream that was being skimmed on public sector contracts. He also mentions that the three bosses of the firms regularly play golf together and he had seen faxes of the other firms' tenders in the office.
ALERT	Alarm bells ring!
ACTION	Encourage insider to contact ACCC with information. They are potentially an important witness or immunity applicant. Contact the ACCC yourself.
EVENT	Whistleblower wants to remain anonymous, for fear of retribution.
ALERT	Do not break confidence.
ACTION	Continue to communicate with the ACCC.

Hypothetical 3

Your organisation plans to develop a large portion of land for low-cost housing. Before the major contractors tender, the site needs to be cleared and drained. It is decided to put the job out to select tender among six firms that have demonstrated the capacity and experience to perform the job. Five of the six firms lodge their bids two days before the close of tender.

Possible bid rigging

EVENT	All five tenders are in the range of 30 per cent to 40 per cent above the estimate.
ALERT	May or may not suggest coordination.
ACTION	Review your estimate and make inquiries about rises of input costs within the market. Note your concerns on file.
EVENT	You note that all five bids have been forwarded from the same firm of accountants, which is, in this instance, acting for all five bidders.
ALERT	Suggests coordination of bidding.
ACTION	Note the details and look closely at the tender submissions. Ask the accountant about their role in acting for all five bidders. Consider reporting to the ACCC.
EVENT	You notice some remarkable similarities in the layout, line-item pricing and wording of the bids.
ALERT	Suggests bidders have shared bid information.
ACTION	Report to ACCC.

Possible 'throwing the bid'

EVENT	All five tenders range between 30 per cent to 40 per cent above the estimate.
ALERT	May or may not suggest coordination.
ACTION	Review your estimate and make inquiries of the market concerning rises of input costs. Note your concerns on file.
EVENT	You note that the two lowest tenders require terms of payment that are not acceptable and a departure from your normal terms. One requires a substantial deposit while the other requires payment within seven days of completion of a stage.
ALERT	Suggests deliberate non-conformance or cover bidding.
ACTION	After the tender exercise, ask the suppliers whether they realised their terms of trade were non-conforming.
EVENT	The two contractors indicate that they are extremely busy at present but wish to be considered for work in the future.
ALERT	Insufficient evidence to indicate collusion.
ACTION	You might be suspicious but the reasons seem to be feasible. You may wish to consider approaching some additional firms and repeating the process. There is probably not sufficient evidence to warrant reporting the incident, but you would be wise to make a file note and see if any future behaviour increases your suspicions.

Hypothetical 4

Your organisation plans to build a new works depot. After the plans have been approved and the costs estimated, you approach three large local firms with sufficient capacity to tender that, on past experience, would be suitable for the task.

Possible bid rigging

EVENT	One supplier declines to tender. A second submits a tender close to estimate but then withdraws. The remaining tenderer has provided a price 28 per cent over the estimated cost.
ALERT	May suggest bid rigging, or may be attributed to market factors.
ACTION	Note and check with the estimator. Analyse the two tenders to understand the difference in the costing structure.
EVENT	You decide not to accept any of the quotes and re-tender, this time widening your specifications so that smaller operators and non-local firms are invited to quote. An interstate operator is the lowest quote, but still 15 per cent over the estimate.
ALERT	Suggests local firms are not competitive, but not necessarily colluding.
ACTION	Note and monitor in the future. The local firms may have colluded or may simply need more competition to force them to do their best. By widening your tender, you have gained a much better result for your organisation. There is probably not enough to warrant reporting to the ACCC.

Hypothetical 5

Your organisation annually tenders for roadworks and, therefore, has a good understanding of the market, the regular contractors and the pricing structure. It has estimated the current tender to be worth around \$1 million and tenders are received from six regular contractors.

Possible bid rigging

EVENT	One week before the close of tenders the relevant industry association is attended by managers of all firms that subsequently tender.
ALERT	No evidence, but opportunity for collusion.
ACTION	Make a file note.
EVENT	All tenders come in high, with the lowest being 40 per cent over the estimate. In the previous five years you have never had to award a contract over estimate.
ALERT	Suggests either a sudden jump in input costs or collusion.
ACTION	Analyse all bids to understand structure of input costs. Compare to previous tenders. Look for similarities or differences in line items to see if a pattern emerges.
EVENT	It is noticed that the layout and the wording in parts of all four tenders is almost identical.
ALERT	Strong indication of collusion.
ACTION	Report to the ACCC.

Note: These examples are purely hypothetical and are intended as illustrations only. They are not intended to be definitive examples that would apply to all circumstances—nor should they be construed as legal advice.

Tender analysis example

Electrical construction contracts

(Contracts awarded every six months—assume all bids above estimate and lowest bidder wins contract)

CONTRACT NO. 1	CONTRACT NO. 2	CONTRACT NO. 3
Contractor A \$1 800 000	Contractor C \$800 000	Contractor D \$650 000
Contractor B \$1 944 000	Contractor B \$1 100 000	Contractor B \$800 000
Contractor C \$2 088 000	Contractor D \$1 800 000	Contractor A \$1 000 000
Contractor D \$2 232 000		
CONTRACT NO. 4	CONTRACT NO. 5	CONTRACT NO. 6
Contractor B \$1 800 000	Contractor C \$1 000 000	Contractor D \$1 150 000
Contractor A \$2 100 000	Contractor A \$1 500 000	Contractor B \$1 510 000
Contractor D \$2 100 000	Contractor B \$1 900 000	Contractor A \$1 525 000
Contractor C \$2 300 000		Contractor C \$1 575 000

Note: Hypothetical example represents three years of regular six-month tenders.

Factors to consider

1. Are each of the tenderers winning equal market share? Yes, each has won \$1.8 million of business over a three-year cycle. Contractor A wins in contract no. 1 but not again. Contractor C wins \$800 000 in contract 2 and \$1 million in contract no. 5 for a total of \$1.8 million.
2. Is there any pattern to losing bids? For contract no. 1 there are equal increments of 8 per cent (\$144 000) between each tender amount.
3. In a competitive market you would think that prices would be close. It may therefore be useful to compare the difference between the lowest and highest bid—for example, identical losing bids in contract no. 4 of \$2.1 million.
4. Companies sometimes bid high and sometimes bid low—there is no pattern suggesting they’re taking their own actual costs into account (for example, contractor A is low on contract no. 1 and high on all others).
5. What is the average price, and how far under the average is the winning bid?
For example, contract nos. 4, 5 and 6 suggest there may have been floors to bid above: \$2 million and \$1.5 million.
6. Cartels may be quite sophisticated about where they pitch non-competitive bids—remember, they need to create the impression of competition. For example, non-competitive bidding can lead to a clustering of bids in an attempt to influence engineers/departamental estimates of the cost of future tenders.

Detecting bid rigging directly from bid data is very difficult. It only provides circumstantial evidence, enough to raise your suspicions. From a legal point of view, it is often difficult to draw strong conclusions because of a lack of direct evidence. The ACCC would need to investigate the circumstances more thoroughly before it could litigate.

Note: This example is purely hypothetical; it is intended as an illustration only. It is not intended to be a definitive example that would apply to all circumstances—nor should it be construed as legal advice.



References and further information

We wish to thank the following sources for information used in this publication.

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Callers who are deaf or have a hearing or speech impairment can contact the

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